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In The

# Supreme Court of the United States

October Term, 1994

SHRICHAND CHAWLA, LEO D. CURRAN, WILLY HERMANS, RED CIRCLE INVESTMENT, LTD., JALEH KHORASSANCHY, AMIT PANDYA, SOHA, INC., IDRISS DEVCO, INC., and S&L GENTRADE, INC.,

*Petitioners,*

vs.

UNITED STATES OF AMERICA,

*Respondent.*

## REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

KEVIN P. RODDY
*Counsel of Record*
MILBERG WEISS BERSHAD HYNES & LERACH
355 South Grand Avenue, Suite 4170
Los Angeles, CA 90071
Telephone: 213/617-9007

PROFESSOR G. ROBERT BLAKEY
Notre Dame School of Law
Notre Dame, IN 46556
Telephone: 219/631-5717

WILLIAM S. LERACH
DENNIS STEWART
WILLIAM DATO
MILBERG WEISS BERSHAD HYNES & LERACH
600 West Broadway, Suite 600
San Diego, CA 92101
Telephone: 619/231-1058

*Attorneys for Petitioners*

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*Petitioners,*

vs.

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## REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Petitioners, by counsel and pursuant to S. Ct. Rule 15.6, hereby file their Reply Brief to the Oppositions to the Petition for Writ of Certiorari filed by the United States Government and the Court Appointed Fiduciaries of BCCI.[1]

[1] Page references to the Petition for Writ of Certiorari, which was filed on May 2, 1995, are stated herein as "Pet. at ___" while references to the appendices thereto are stated herein as "A-___." Page references to the Brief for the United States in Opposition are stated herein as "Gov't Opp. at ___" while references to the Brief for the Court Appointed Fiduciaries of BCCI in Opposition are stated herein as "Fid. Opp. at ___." While those Oppositions were filed in this Court on June 7, 1995, they were not served on counsel of record for Petitioners until June 12, 1995.

**1. Petitioners Have Standing To Challenge The RICO Forfeiture Order**

Challenges to Petitioners' standing raised by the Government and the Fiduciaries are without merit. *See* Gov't Opp. at 2; Fid. Opp. at 14. In accordance with Section 1963(*l*) of RICO, in the courts below Petitioners properly asserted a "legal right, title, or interest" in BCCI's multi-million dollar forfeited assets by alleging a constructive trust or equitable lien over the billions of dollars which they were defrauded into depositing into the BCCI Banks years before BCCI's commission of the pattern of racketeering activity which led to its 1992 RICO guilty plea and the resulting forfeiture order. *See* Pet. at 8-9.

To show standing, a litigant must allege a "distinct and palpable injury to himself," *Warth v. Seldin*, 422 U.S. 490, 501 (1975), fairly traceable to the "putatively illegal conduct of the defendant," *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979), and likely to be redressed by the requested relief, *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 44-45 (1976). *See also Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970) (standing inquiry is also informed by "whether the interest sought to be protected by the complainant is arguably within the zone of interests sought to be protected or regulated by the statute or constitutional guarantee in question"). The Government and the Fiduciaries ignore the fact that the legislative history underlying the 1984 amendments to Section 1963(*l*) of RICO indicates that an expansive "zone of interests" is protected by allowing innocent third parties such as Petitioners to challenge forfeiture orders, *see* Pet. at 16-19, as the District of Columbia Circuit conceded in this case, *see* A-10 to A-11. As the First Circuit has said, commenting on standing in a forfeiture action, "[a]t this preliminary juncture . . . the claimant need not prove the full merits of her underlying claim. All that needs to be shown is a 'facially colorable interest in the proceedings

sufficient to satisfy the case-or-controversy requirement' and 'prudential considerations defining and limiting the role of the court.' " *United States v. 116 Emerson Street*, 942 F.2d 74, 78 (1st Cir. 1991) (citations omitted).

Petitioners have more than satisfied the applicable standard in this case[2] because they clearly assert a "distinct and palpable injury," *Warth*, 422 U.S. at 501 – the loss of hundreds of millions of dollars worth of illegally-obtained deposits through an allegedly unlawful RICO forfeiture – that is the direct result of "putatively illegal" governmental action, *Gladstone Realtors*, 441 U.S. at 99, and their injury would be redressed by a successful challenge to the district court's forfeiture order, *Simon*, 426 U.S. at 44-45. Further, with respect to the "zone of interests," *Data Processing*, 397 U.S. at 153, Petitioners have alleged (and made a prima facie showing) that they possess the beneficial ownership of a constructive trust or equitable lien over their deposits in the BCCI Banks. *See Torres v. $36,256.80 U.S. Currency*, 25 F.3d 1154, 1158 (2d Cir. 1994). Therefore, the challenges to Petitioners' standing raised by the Government and the Fiduciaries should be overruled.

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[2] The Fiduciaries argue that the Petition should be denied, contending that the record in this case has not been sufficiently developed to allow "[t]houghtful [c]onsideration" of the important issues presented by Petitioners, Fid. Opp. at 15, conveniently ignoring the fact that the district court, at the urging of the Fiduciaries and the Government, improperly denied Petitioners their statutorily-mandated right to an evidentiary hearing to contest the forfeiture order. *See* Pet. at 17-19; 18 U.S.C. § 1963(*l*)(5) ("At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. . . . ").

**2. The Constructive Trust Or Equitable Lien Asserted By Petitioners Constitutes A Legal Right, Title, Or Interest In BCCI's Forfeited Property**

Contrary to the Government's assertion, *see* Gov't Opp. at 8-10, the District of Columbia Circuit squarely held that the constructive trust or equitable lien asserted by Petitioners constitutes a "*legal* right, title, or interest" in BCCI's forfeited property, 18 U.S.C. §1963(*l*)(6)(A) (emphasis added), and it *rejected* the arguments which the Government seeks to resurrect in this Court. *Compare* Gov't Opp. at 8 (asserting that Petitioners "waived" their right to assert a constructive trust over BCCI's forfeited property) *with* A-8 ("[S]ince the government does not actually challenge the district court's ruling [permitting the defrauded depositors to assert a constructive trust theory], we do not understand why the government even raises the matter before us"); *compare* Gov't Opp. at 9-10 (asserting that a constructive trust is an "equitable" remedy, not a legal right, title, or interest under Section 1963(*l*)(A) of RICO) *with* A-10 ("[W]e agree with our sister circuits that have rejected the notion that Congress intended to draw the ancient, but largely ignored, distinction between technically legal and technically equitable claims in forfeiture challenges.") (citations omitted). Moreover, the Government continues to ignore the fact that *every* circuit and district court to address the issue has held that a constructive trust or equitable lien constitutes a legal right, title, or interest under Section 1963(*l*)(6)(A) of RICO. *Compare* Pet. at 11 n.6 (collecting cases) *with* Gov't Opp. at 8-10 (ignoring cases). *See also United States v. Coluccio*, 51 F.3d 337, ___ (2d Cir. 1995) (holding that a claimant who asserted a constructive trust over $2,500 used to secure a cost bond had standing to contest forfeiture of the bond under 21 U.S.C. §881 because the Government's forfeiture "would result in unjust enrichment of the Government and commensurate unjust impoverishment of the claimant if Ms. Coluccio were denied standing") (citing *Torres*, 25 F.3d at 1159).

### 3. The Legal Right, Title, Or Interest Was Vested In Petitioners Rather Than BCCI

Under Section 1963(*l*) of RICO, Petitioners asserted in the courts below that their legal right, title, or interest in the forfeited property rendered the forfeiture order invalid "because the right, title, or interest was vested in the [P]etitioner[s] rather than [BCCI]." 18 U.S.C. §1963(*l*)(6)(A). Both the Government and the Fiduciaries inexplicably ignore the plethora of cases and secondary authorities squarely holding that because their multi-billion dollar deposits were induced by fraud, Petitioners retained title to their money, *which never passed to the BCCI Banks* and, thus, BCCI never had property interests in the stolen money which could be forfeited to the Government under RICO. *Compare* Pet. at 22 & n.18 *with* Gov't Opp. at 10-11 *and* Fid. Opp. at 7, 15-16; *see also United States v. Lavin*, 942 F.2d 177, 185 (3d Cir. 1991); *County of Oakland v. Vista Disposal*, 875 F.2d 410 (E.D. Mich. 1995).[3] Therefore, title to the forfeited property was *vested* in Petitioners, rather than BCCI, and by forfeiture the Government can succeed to no greater title than that held by the criminal defendant. *See* Pet. at 19-20.

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[3] Unfairly accusing Petitioners of seeking to jump the queue of BCCI's other creditors in priority, *see* Fid. Opp. at 7, the Fiduciaries (and the Government) ignore the fact that it is the Government which improperly seeks to advance its distribution priority by this forfeiture proceeding, *see* Pet. at 13 & n.7, and that under these circumstances – where Petitioners allege that they were defrauded into making their deposits into an insolvent bank – they are *entitled to priority* over the general creditors of the BCCI Banks, *id.* at 24 n.20; *see also St. Louis & S.F. Ry. v. Johnston*, 133 U.S. 566, 576-77 (1890); *Carnegie-Illinois Steel Corp. v. Berger*, 105 F.2d 485, 487 (3d Cir.), *cert. denied*, 308 U.S. 603 (1939); *Standard Oil Co. v. Elliott*, 80 F.2d 158, 161 (4th Cir. 1935); *Federal Reserve Bank v. Omaha Nat'l Bank*, 45 F.2d 511, 519 (8th Cir. 1930), *cert. denied*, 282 U.S. 902 (1931).

### 4. Petitioner's Interest In The Forfeited Property Is Superior To BCCI's Non-Existent Interest

In the courts below, Petitioners correctly (and consistently) asserted that their constructive trust or equitable lien over BCCI's forfeited property "was superior to any right, title, or interest of [BCCI] at the time of the commission of the acts which gave rise to" the forfeiture order. 18 U.S.C. §1963(*l*)(6)(A). Neither the Government nor the Fiduciaries can dispute the fact that Petitioners' constructive trust or equitable lien over that forfeited property arose when their deposits were made years before BCCI committed the predicate acts which led to its 1992 RICO guilty plea and the forfeiture order at issue. *Compare* Pet. at 25 *with* Gov't Opp. at 10. Contrary to the Government's assertion, *see* Gov't Opp. at 10-11, which is parroted by the Fiduciaries, *see* Fid. Opp. at 16-17, RICO's express statutory language gives the district court no discretion as to whether or not it will recognize Petitioners' legal right, title, or interest; indeed, neither the Government nor the Fiduciaries cite any cases to support the unique proposition which they now advance.

Moreover, neither the Government nor the Fiduciaries make any attempt to distinguish numerous forfeiture cases – including this Court's venerable decision in *United States v. Stowell*, 133 U.S. 1, 19 (1890) – clearly holding that (1) Petitioners' constructive trust or equitable lien arose at the time they were fraudulently induced to deposit their money into the insolvent BCCI Banks; (2) Petitioners' constructive trust or equitable lien, if proven at the statutorily-mandated evidentiary hearing, is superior to any possessory interest held by BCCI; and (3) the Government, through forfeiture, simply steps into BCCI's shoes and its interest is, therefore, subordinate to Petitioners' right, title, or interest. *See* Pet. at 25-28 (collecting cases and secondary authorities); *see also Lavin*, 942 F.2d at 185; *In re Metmor Fin., Inc.*, 819 F.2d 446, 448-49 (4th Cir. 1987); *County of Oakland v. Vista Disposal*, 840 F. Supp. 73, 77 (E.D. Mich. 1993); *United States v. 1419 Mount Alto*

*Road*, 830 F. Supp. 1476, 1481-82 (N.D. Ga. 1993). Contrary to the Government's and the Fiduciaries' submissions, *see* Gov't Opp. at 12-15; Fid. Opp. at 10-13, the District of Columbia Court of Appeals flatly refused to follow decisions from the Second, Third, Fourth, Sixth and Seventh Circuits holding that a constructive trust (or equitable lien) can be interposed as *superior* to the Government's forfeiture claim under Section 1963(*l*)(6)(A), or equivalent criminal forfeiture statutes, *see* A-12, thereby creating a *split* in the circuits which only this Court can resolve.

### 5. Application Of The Relation-Back Doctrine Does Not Save The Illegal Forfeiture Order

Improperly seeking to trump Petitioners' constructive trust or equitable lien over BCCI's forfeited property, the Government relies on the so-called "relation-back doctrine," once again ignoring the fact that Petitioners were defrauded into depositing their money into the BCCI Banks years before BCCI used their money to commit the predicate acts which resulted in the 1992 guilty plea and resulting RICO forfeiture order. *Compare* Pet. at 20-21, 28 *with* Gov't Opp. at 11-12. As the Government must concede, *see* Gov't Opp. at 12, this Court's decision in *United States v. 92 Buena Vista Avenue*, ___ U.S. ___, 113 S. Ct. 1126, 1136-37 (1993) (plurality opinion), limits the sweep of the relation-back doctrine to protect the rights of innocent owners whose property interests existed at the time of the criminal acts giving rise to the forfeiture. The Government ignores the fact that subsequent decisions construing and applying *92 Buena Vista Avenue* clearly support Petitioners' position here. For example, in *Counihan v. Allstate Insurance Co.*, 25 F.3d 109 (2d Cir. 1994), the Second Circuit held that the relation-back provision of the drug offense forfeiture statute, 21 U.S.C. §881(h) – which is virtually identical to RICO's relation-back provision, 18 U.S.C. §1963(c) – could not divest a property owner of an insurable interest so as to bar recovery on a fire insurance policy where the fire loss

occurred before the government acquired title to the property pursuant to a final decree of forfeiture. Recognizing that the insured's rights under a fire insurance policy are fixed both as to the amount and standing to recover at the time of the fire loss, *id.* at 111 – just as Petitioners' constructive trust or equitable lien arose when they were fraudulently induced to deposit their money into the BCCI Banks, *see* Pet. at 25-27 – the Second Circuit relied on this Court's decision in *92 Buena Vista Avenue*, 113 S. Ct. at 1137, to support its holding protecting the innocent property owner's rights:

> The foregoing compels the conclusion that not every right of the owner is lost by virtue of the relation-back of title. Among the rights that survive are rights under a fire insurance policy which, as previously noted, "are fixed both as to amount and standing to recover at the time of the fire loss." Here, the government did not win a final judgment of forfeiture until long after the loss by fire of the property in which plaintiff clearly had an insurable interest. By the time that judgment was entered, the right of plaintiff to assert a claim under her insurance policy had become fixed. Simply put, the government could not contend that it owned the property until a judgment of forfeiture was entered. By then, Allstate's obligation to pay had become fixed under plaintiff's policy and that obligation could not be discharged by the operation of the legal fiction known as relation-back.

25 F.3d at 113 (citations omitted). *Accord United States v. Real Property Located at 41741 National Trails Way*, 989 F.2d 1089, 1091-92 (9th Cir. 1993) (government's retroactive title does not defeat attorney's lien for fees incurred in defending against forfeiture); *United States v. Moffitt*, 875 F. Supp. 1190 (E.D. Va. 1995).

These cases clearly support Petitioners' assertion that their constructive trust or equitable lien was in existence "at the time of the commission of the [predicate] acts which gave rise to the forfeiture" of BCCI's property, 18

U.S.C. §1963(*l*)(6)(A), and, under this Court's decision in *92 Buena Vista Avenue*, the RICO forfeiture order and the relation-back doctrine cannot be used by the Government to divest Petitioners of their right, title, or interest.

### 6. Public Policy Grounds Do Not Support Denial Of The Petition

Finally, both the Government and the Fiduciaries contend that the Petition should be denied because, in their view, allowing Petitioners to challenge the RICO forfeiture order would interfere with BCCI's liquidation proceedings in Luxembourg. *See* Gov't Opp. at 15; Fid. Opp. at 16-19. There are no facts supporting the Fiduciaries' statement that this Court's review of the illegal RICO forfeiture entered in this case would "significantly delay compensation to the depositors and other creditors of BCCI," Fid. Opp. at 16; indeed, the Fiduciaries neglect to inform this Court that BCCI's liquidation proceeding, which has been pending in Luxembourg for over three years, has yet to pay a single penny, pound, or franc to *any* depositor, but the Fiduciaries (and their professional advisors) have nevertheless collected millions of dollars in fees.

Contrary to the position taken by the Fiduciaries, permitting the defrauded depositors represented by Petitioners to assert their rights to BCCI's forfeited property under Section 1963(*l*) of RICO will not cause a "tremendous disruption" in the ongoing liquidation proceedings. Fid. Opp. at 18. Contrary to the situation presented in *Downriver Community Fed. Credit Union v. Penn Square Bank*, 879 F.2d 754, 763 (10th Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990), upon which the Fiduciaries place great reliance, *see* Fid. Opp. at 17-19, permitting Petitioners to challenge the RICO forfeiture order in this case will not result in unequal treatment of the hundreds of thousands of defrauded depositors in the BCCI Banks because Petitioners seek to represent all of them. Moreover, contrary to their assertion before this Court, the Fiduciaries do not

have the sole right to act on behalf of all BCCI depositors, each of whom are the beneficiaries of the constructive trust or equitable lien which Petitioners asserted in the courts below. *Cf. Hayes v. Gross*, 982 F.2d 104, 108-09 (3d Cir. 1992).

### 7. Conclusion

For the reasons stated herein, as well as in the Petition for Writ of Certiorari, review of the RICO forfeiture order and the proceedings in the courts below by this Court is essential to secure justice and compensation for the hundreds of thousands of defrauded BCCI depositors.

DATED: June 15, 1995

KEVIN P. RODDY
MILBERG WEISS BERSHAD
HYNES & LERACH
355 South Grand Avenue
Suite 4170
Los Angeles, CA 90071
Telephone: 213/617-9007

*Counsel of Record*

WILLIAM S. LERACH
DENNIS STEWART
WILLIAM DATO
MILBERG WEISS BERSHAD
HYNES & LERACH
600 West Broadway
Suite 1800
San Diego, CA 92101
Telephone: 619/231-1058

PROFESSOR G. ROBERT BLAKEY
Notre Dame School of Law
Notre Dame, IN 46556
Telephone: 219/631-5717

*Attorneys for Petitioners*